

F. IRC 7602 EXAMINATION OF BOOKS AND WITNESSES

by
Glenn Cunningham and Robert Gardiner

1. Introduction

Congress has given the Internal Revenue Service broad powers to compel the production of information it requires to ascertain tax liability or to collect tax. Section 7602 of the Internal Revenue Code permits the Service, for any statutorily authorized purpose, to:

- (1) examine any books, papers, records or other data;
- (2) summon a taxpayer or any other person, requiring the person to appear, to produce books and records, and to give testimony under oath; and
- (3) take testimony under oath.

2. Delegation Order No. 4 (Rev.21)

Delegation Order No. 4, Authority to Issue Summonses, to Administer Oaths and Certify, and to Perform Other Functions, authorizes district Employee Plans and Exempt Organization Internal Revenue Agents, Tax Law Specialists, and Tax Auditors to issue summonses, except summonses to third parties, which must be approved by a case manager, group manager, or a supervisory official above the level of group manager; to serve summonses; to examine books, papers, records or other data; to take testimony under oath, and to set the time and place of examination. In addition, these officers and employees are designated to administer oaths and affirmations and to certify to such papers as may be necessary under the internal revenue laws and regulations except that the authority to certify shall not be construed as applying to those papers or documents the certification of which is authorized by separate order or directive.

Delegation Order No. 4 includes limitations which are applicable to student trainees and aides.

Section 7622(a) of the Code provides that every officer or employee of the Treasury Department designated by the Secretary to administer oaths and certify is authorized to administer such oaths or affirmations and to certify to such papers as may be necessary under the internal revenue laws or regulations made thereunder.

3. Examine Any Books, Papers, Records or Other Data and Take Testimony Under Oath

Section 7602 authorizes the Secretary to examine any books, papers, records, or other data which may be relevant or material (emphasis added) and take such testimony of the person concerned, under oath, as may be relevant (emphasis added) to:

- (1) determine if a return is correct;
- (2) make a return where there is none;
- (3) determine tax liability of any person for any internal revenue tax;
- (4) determine the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax;
- (5) collect taxes; or
- (6) inquire into any offense connected with the administration or enforcement of the internal revenue laws.

IRC 7602 provides the authority to interview the taxpayer, principal officers, third parties, and lower level employees. The principal officer or taxpayer's representative should always be informed before interviews of lower level employees begin.

The right to interview a third party is a strong power and should not be abused or used frivolously.

The specialist can summons anyone pertinent to the case for testimony and an interview.

Administering an oath to a taxpayer is an underutilized tool for an agent. The oath is very effective when interviewing third parties, subordinate employees, etc. Also, if a taxpayer has previously given inaccurate or misleading testimony, the same questions should be asked again under oath. The oath should not always be used at the start of an interview. It should be used at the first sign of a misstatement.

Misstatements under oath are significant in fraud cases since they may show willfulness and intent as well as prior knowledge.

Every agent should know how to administer an oath.

When the oath is administered, the person taking it should be asked to stand and raise his or her right hand. The oath should be given as follows:

"Do you solemnly swear (affirm) under the penalties of perjury that the testimony you are about to give in this matter is true and correct to the best of your knowledge and belief so help you God?"

As noted, the term "affirm" may be substituted. The phrase "so help you God" may be omitted. The witness should respond by saying "I do." See IRM 4022.41(3). However, a witness cannot be forced to give testimony under oath. Where a witness refuses to take the oath, a memorandum should be prepared to document the fact that the witness refused to take the oath.

4. Authority to Summons

A summons may be used to compel testimony, and/or the production of books, papers, records, or other data that may be relevant or material to any of the purposes listed in section 3, above.

A summons may be issued for a dual purpose, i.e., to investigate both the summonee and unknown taxpayers. A dual-purpose summons directs the summonee to surrender information concerning both the summonee and taxpayers whose identities are currently unknown to the Service. Tiffany Fine Arts, Inc. v. United States, 469 U.S. 310, 315-16 (1985) provides an example of such a summons. There the Service issued several summonses to a taxpayer, a holding company, and its tax-shelter promoting subsidiaries. The summonses ordered the holding company to surrender its own financial statements and the names and addresses of all persons who had acquired from the taxpayer licenses to distribute medical devices.

The John Doe procedures of IRC 7609(f) do not apply as long as all the summoned information is relevant to the investigation of the taxpayer-summonee. The Service must, however, comply with the John Doe procedures of IRC 7609(f) if the information sought is relevant only to the investigation of the unnamed taxpayers.

5. Special Procedures for Third-Party Summonses

Special procedures contained in IRC 7609(a) and (b) apply anytime an examiner issues a third-party summons to a third-party recordkeeper. These procedures require the examiner to notify the taxpayers that a third-party recordkeeper summons has been issued and inform them of their right to intervene in any court proceeding brought to enforce the summons. These procedures apply only when the summonee is a third-party recordkeeper.

A third-party recordkeeper is specifically defined in IRC 7609(a)(3). Also included in this group are recordkeepers that extend credit by credit cards or similar devices, such as telephone companies and gambling casinos that extend credit or cashing privileges through credit cards. See United States v. New York Telephone Co., 644 F.2d 953 (2d Cir. 1981).

A thorough discussion of third-party summons may be found in the **Continuing Professional Education Exempt Organizations Technical Instruction Program for 1993 at G. Summons and Enforcement**, page 104.

6. No Administrative Summons When There is Justice Department Referral

A. Limitation of Authority

No summons may be issued or enforced by the Service when a Justice Department referral is in effect with respect to the taxpayer. See IRC 7602(c).

B. Justice Department Referral In Effect

A Justice Department referral is in effect when (1) the Service recommends a grand jury investigation or a criminal prosecution of the taxpayer; or (2) the Attorney General, Deputy Attorney General, or Assistant Attorney General makes a written request to the Service for the taxpayer's return or other return information relating to the taxpayer. See IRM 4022.3(2). A referral is no longer in effect when the Attorney General notifies the Service that (1) it will not prosecute the taxpayer; (2) it will not authorize a grand jury investigation; (3) it will discontinue a grand jury investigation; or (4) there has been a final

disposition in a criminal tax proceeding against the taxpayer. In the case of a referral initiated by the Attorney General, the referral ends when the Attorney General notifies the Service, in writing, that the taxpayer will not be prosecuted. IRM 4022.3(2). See IRC 7602(c)(2)(B).

C. Taxable Years, etc., Treated Separately

Each taxable period (or, in the case of excise taxes, each taxable event) must be treated separately. As a result, the Service may issue a summons for one taxable year even if a Department of Justice referral is in effect with respect to the taxpayer for another taxable year.

7. Purpose May Include Inquiry Into Offenses

The Secretary may examine, summon, and take testimony for the purpose of inquiring into any offense connected with the administration or enforcement of the internal revenue laws.

8. Summary

District Employee Plans and Exempt Organization Internal Revenue Agents, Tax Law Specialists, and Tax Auditors have authority to perform all duties conferred upon such officers under all laws and regulations administered by the Internal Revenue Service, including the authority to investigate, and to require and receive information, as to all matters relating to such laws and regulations.

A thorough discussion of the power to summon, its limitations, summons enforcement, and the procedures involved in issuing a summons may be found in the **Continuing Professional Education Exempt Organizations Technical Instruction Program for 1993** at **G. Summons and Enforcement**, page 100.